Supreme Court, U.S.
FILED
APR 7 1997
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No. 96-1238

In the Supreme Court of the United States

OCTOBER TERM, 1996

RICHARD DIRK SELLAND, PETITIONER

v.

WILLIAM S. COHEN, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
ANTHONY J. STEINMEYER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The Act of Congress governing service by homosexuals in the military, 10 U.S.C. 654, requires separation of a member who, like petitioner, states that he is a homosexual and fails to rebut the presumption arising from that statement that he has engaged in, or has a propensity to engage in, homosexual acts. The question presented is whether that Act and petitioner's discharge under it are consistent with equal protection, the First Amendment, due process, and the Administrative Procedure Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 100 F.3d 950 (Table). The opinion of the district court (Pet. App. 3a-16a) is reported at 905 F. Supp. 260.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1996. The petition for a writ of certiorari was filed on February 5, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Act of Congress governing military service by homosexuals, 10 U.S.C. 654 (Pet. App. 108a-113a), is discussed in detail in our brief in opposition in *Thomasson* v. *Perry*, No. 96-1, in which this Court denied certiorari on October 21, 1996. 117 S. Ct. 358.[1] Congress found that the longstanding "prohibition against homosexual conduct * * * continues to be necessary in the unique circumstances of military service." 10 U.S.C. 654(a)(13). Congress also determined (10 U.S.C. 654(a)(15)):

> The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

Accordingly, the Act provides for separation from service if a member has: (1) "engaged in, attempted to engage in, or solicited another to engage in a homosexual act"; (2) "stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts"; or (3) "married or attempted to

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[1] We have furnished counsel for petitioner with a copy of our brief in opposition in *Thomasson*.

marry a person known to be of the same biological sex." 10 U.S.C. 654(b)(1)-(3).[2]

2. Pursuant to statutory provisions for the issuance of implementing regulations and procedures, the Department of Defense promulgated several directives to govern separations under the Act. DoD Directive 1332.30 (Pet. App. 114a-144a), applicable to officers, governs this case, and a substantially similar directive, DoD Directive 1332.14, applies to enlisted personnel. To implement the "statements" provision of the Act (10 U.S.C. 654(b)(2)), DoD Directive 1332.30 provides that a statement by an officer that he "is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the officer engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." DoD Dir. 1332.30 (Encl. 2) ¶ C.1.b; Pet. App. 123a. The officer is "given the opportunity to rebut the presumption by presenting evidence" to an administrative board "demonstrating that he * * * does not engage in, attempt to engage in, have a propensity to engage in or intend to engage in homosexual acts." *Ibid.*

A "[p]ropensity to engage in homosexual acts" is defined as "more than an abstract preference or desire to engage in homosexual acts; it indicates a *likelihood* that a person engages in or will engage in homosexual acts." DoD Dir. 1332.30 (Encl. 8) ¶ B.4.d;

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[2] The Act defines "homosexual act" as "(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A)." 10 U.S.C. 654(f)(3).

Pet. App. 140a-141a (emphasis added). By contrast, sexual orientation—defined as "[a]n abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts" (DoD Dir. 1332.30 (Encl. 8) ¶ B.5; Pet. App. 141a)—"is considered a personal and private matter, and is not a bar to continued service * * * unless manifested by homosexual conduct." DoD Dir. 1332.30 (Encl. 2) ¶ C; Pet. App. 122a.[3] An officer's statement that he is a homosexual "is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts." *Ibid.* The Directive also sets forth the types of evidence an officer may offer to rebut the presumption. DoD Dir. 1332.30 (Encl. 2) ¶ C.1.b; Pet. App. 123a.

3. Petitioner, then a lieutenant in the Navy, was assigned to a nuclear submarine. Pet. App. 5a. After crew members joked about his homosexuality, petitioner consulted a Navy chaplain. *Ibid.* Petitioner and the chaplain then met with petitioner's commander, and petitioner stated that he was homosexual and involved in a monogamous homosexual relationship. *Ibid.*

Based upon his statement, the Navy instituted a separation proceeding against petitioner. Pet. App. 5a.[4] At the hearing conducted by an administrative

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[3] "Homosexual conduct" is defined by the Directive as "a homosexual act, a statement by the member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage." DoD Dir. 1332.30 (Encl. 8) ¶ B.4; Pet. App. 140a.

[4] Petitioner secured a preliminary injunction barring his separation pursuant to the former policy regarding military service by homosexuals. *Selland* v. *Aspin*, 832 F. Supp. 12

board of inquiry, petitioner introduced evidence of his contribution to the Navy, but he did not attempt to rebut the presumption of homosexual acts that arose from his statement, and he did not deny an intent to engage in future homosexual acts. *Id.* at 6a.

The board found that petitioner had stated to his commander that he is homosexual and had made other public statements to that effect. Pet. App. 102a-103a. The board also found that petitioner had not rebutted the presumption, arising from those statements, that he had engaged in homosexual acts in the past and would engage in such acts in the future. *Id.* at 103a-104a. Based upon those findings, the board recommended that petitioner be separated with an honorable discharge. *Id.* at 104a. That recommendation was reviewed and approved by the Deputy Chief of Naval Personnel and an Assistant Secretary of the Navy. *Id.* at 95a-98a.

4. Petitioner then brought this action seeking declaratory and injunctive relief to prevent his discharge. After initially issuing a preliminary injunction (see Pet. App. 6a), the district court granted summary judgment for the government, holding that 10 U.S.C. 654 is valid. Pet. App. 3a-16a.

The Fourth Circuit affirmed in an unpublished per curiam decision. Pet. App. 1a-2a. It held that its *en banc* decision in *Thomasson* v. *Perry*, 80 F.3d 915 (4th Cir.), cert. denied, 117 S. Ct. 358 (1996) (Pet. App. 17a-94a), which had been issued while petitioner's appeal was pending, was dispositive of this case.

(D.D.C. 1993). That suit was dismissed by stipulation after the current Act became effective. Pet. 5. The Navy then proceeded against petitioner under the new Act.

ARGUMENT

Petitioner does not contend that the issues that he raises are distinguishable from those decided by the Fourth Circuit in *Thomasson*. The decision in *Thomasson* is correct and in accord with the decisions of the three other courts of appeals that have considered the validity of the statutory policy regarding military service by homosexuals. This Court recently denied certiorari in *Thomasson*, and there has been no change in circumstances that would warrant a different result here. Accordingly, further review is not warranted.

1. In *Thomasson*, as here, a Navy lieutenant was discharged under 10 U.S.C. 654 based upon his statement that he is a homosexual. Both officers argued that the governing statute violated equal protection, the First Amendment, due process, and the Administrative Procedure Act (APA).[5] The *en banc* Fourth Circuit correctly rejected those challenges in *Thomasson*, and the panel below properly held that it was bound by that decision.

Petitioner first argues that the court of appeals abdicated its role to review the constitutional issues. Pet. 14. In *Thomasson*, however, the court of appeals fully and carefully considered all issues raised (80 F.3d at 927-934; Pet. App. 35a-49a), although it properly recognized (80 F.3d at 921-927; Pet. App. 22a-35a) that this Court's precedents require great deference

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[5] Petitioner initially raised an argument, not presented in *Thomasson*, that one member of his Navy board of inquiry should have been removed from the board for bias. The district court rejected that claim (Pet. App. 14a), and the court of appeals granted petitioner's consented motion to dismiss that claim. Petitioner does not reassert that claim in this Court.

both to the constitutional authority of Congress and the Executive over military affairs and to the considered professional judgment of military officials with respect to personnel policies. See, *e.g.*, *Rostker* v. *Goldberg*, 453 U.S. 57, 64-72 (1981); *Goldman* v. *Weinberger*, 475 U.S. 503, 508-509 (1986).

In arguing that the Act violates equal protection, petitioner erroneously contends that it "targets homosexuals for discharge from the military, based solely on their status." Pet. 16. As the discussion above shows (see pages 3-4, *supra*), and as the *Thomasson* court held, the Act classifies on the basis of "service members who engage in or have a propensity to engage in homosexual acts." 80 F.3d at 928; Pet. App. 36a. The *Thomasson* court correctly held that the Act represents "a legitimate legislative choice," based upon Congress's and the military's assessment of the need for unit cohesion, privacy concerns, and the strong interest in minimizing sexual tensions and attractions "in the unique circumstances of military service." 80 F.3d at 928, 929; Pet. App. 37a-38a, 38a-39a (quoting 10 U.S.C. 654(a)(13)). The court further held that "it is legitimate for Congress to proscribe homosexual acts" and also "to seek to * * * *prevent* the commission of such acts" by means of the "statements" provision of the policy. 80 F.3d at 929; Pet. App. 39a. The presumption that a service member who states that he is a homosexual has "a propensity or intent to engage in homosexual acts" was correctly held in *Thomasson* to have "a rational factual basis" and to be legally permissible. 80 F.3d at 930; Pet. App. 40a. The court noted that the rational-basis standard allows (1) "'an imperfect fit between means and ends,'" (2) "general employment policies to prevent unsatisfactory conduct," and (3) "a

reasonable means of allocating the burden of proof." 80 F.3d at 930; Pet. App. 41a (quoting *Heller* v. *Doe*, 509 U.S. 312, 321 (1993)). Finding that the Act serves legitimate purposes, the *Thomasson* court properly rejected the claim, made by petitioner here (Pet. 14-16), that the Act is based upon prejudice against homosexuals. 80 F.3d at 927; Pet. App. 35a. Accord, *Richenberg* v. *Perry*, 97 F.3d 256, 261 (8th Cir. 1996); *Philips* v. *Perry*, No. 95-35293 (9th Cir. Feb. 14, 1997), slip op. 1430-1433; see *Thomasson* Br. in Opp. at 13-16.[6]

2. Petitioner also errs in arguing that the Act violates the First Amendment. Pet. 21-22. As the Fourth Circuit correctly held in *Thomasson* (80 F.3d at 931-934; Pet. App. 42a-48a), the Act treats a service member's statement of homosexual orientation as a basis from which to presume, in the absence of rebuttal by him, that he engages in, or is likely to engage in, homosexual acts. The First Amendment does not prohibit such evidentiary use of a member's statement. *Philips* v. *Perry*, slip op. 1434; *Richenberg* v. *Perry*, 97 F.3d at 262-263; *Able* v. *United States*, 88 F.3d 1280, 1292-1300 (2d Cir. 1996). See *Wayte* v. *United States*, 470 U.S. 598 (1985). In addition, expressive conduct may be restricted in the military context if it is "likely to interfere with * * * vital prerequisites for military effectiveness." *Brown* v. *Glines*, 444 U.S. 348, 354 (1980). The express legislative findings supporting the statutory provision at issue here (see 10 U.S.C. 654(a); Pet. App. 108a-110a) show that that test is met.

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[6] Our brief in opposition in *Thomasson* (at 16-18) also demonstrated that *Romer* v. *Evans*, 116 S. Ct. 1620 (1996), upon which petitioner relies (Pet. 16), does not cast doubt upon the validity of 10 U.S.C. 654.

3. Petitioner also errs in contending that proceedings under the Act violate due process and the APA because the rebuttable presumption "is a[n] illusory standard that cannot be satisfied." Pet. 22. Petitioner was afforded a full and fair opportunity at his administrative hearing to rebut the presumption that he had engaged in or was likely to engage in homosexual acts. In finding that he failed to rebut that presumption, the board relied upon petitioner's own statement that he is involved in a monogamous homosexual relationship and his failure to state that he does not intend to engage in future homosexual acts. Pet. App. 103a.[7] Thus, the board's finding that petitioner did not rebut the presumption is amply supported, as the district court concluded. *Id.* at 14a. That fact-bound determination, which both lower courts have sustained, does not warrant review by this Court. See *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980).

4. Contrary to petitioner's argument (Pet. 11-13), the decisions of the court below in this case and in *Thomasson* are in accord with the decisions of the three other courts of appeals that have considered the validity of 10 U.S.C. 654. *Richenberg* v. *Perry*, 97 F.3d 256 (8th Cir. 1996), sustained a discharge under the Act against equal protection, First Amendment,

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[7] The board expressed concern that petitioner's initial statement that he was a homosexual was made in the context of a private meeting with his commander. Pet. App. 103a. The board determined, however, that "as a naval officer, [petitioner] should have realized" that his commander would be "compelled, by duty, to act" when a violation of a military regulation was brought to his attention. *Ibid.* No statement that petitioner made to the Navy chaplain was a basis for his discharge. See *id.* at 95a-105a.

due process, and APA challenges similar to those petitioner asserts. *Able* v. *United States*, 88 F.3d 1280 (2d Cir. 1996), rejected a First Amendment challenge to the Act, although the Second Circuit conditioned its holding upon a determination that the Act's prohibition of homosexual acts is valid, and it remanded for resolution of that issue. *Philips* v. *Perry*, No. 95-35293 (9th Cir. Feb. 14, 1997), sustained the Act against equal protection and First Amendment challenges advanced by a service member who stated that he was homosexual and had engaged in homosexual acts in the past and would continue to do so in the future.[8] In view of the consistent decisions of four courts of appeals sustaining the current Act—and those of four additional courts of appeals (the D.C., Federal, Seventh, and Tenth Circuits) sustaining the substantially similar discharge standards of the former policy[9]—certiorari is not warranted.

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[8] Two other cases challenging the "statements" portion of the Act are now pending before the Ninth Circuit. *Watson* v. *Perry*, 918 F. Supp. 1403 (W.D. Wash. 1996), appeal pending, No. 96-35314 (argued July 8, 1996); *Holmes* v. *California Army Nat'l Guard*, 920 F. Supp. 1510 (N.D. Cal. 1996), appeals pending, Nos. 96-15726 & 96-15855 (argued July 8, 1996).

[9] Five courts of appeals rejected equal protection challenges. *Steffan* v. *Perry*, 41 F.3d 677, 695 (D.C. Cir. 1994) (en banc); *Meinhold* v. *Department of Defense*, 34 F.3d 1469, 1479 (9th Cir. 1994); *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 463-466 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); *Woodward* v. *United States*, 871 F.2d 1068, 1075-1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); *Rich* v. *Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984). The Ninth Circuit sustained the former policy in *Meinhold* but construed it in a unique, narrow, and at in our view erroneous manner. See *Thomasson* Br. in Opp. at 21 n.10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
ANTHONY J. STEINMEYER
Attorney

APRIL 1997

Three courts of appeals rejected First Amendment challenges. *Pruitt* v. *Cheney*, 963 F.2d 1160, 1163-1164 (9th Cir. 1991), cert. denied, 506 U.S. 1020 (1992); *Schowengerdt* v. *United States*, 944 F.2d 483, 489 (9th Cir. 1991), cert. denied, 503 U.S. 951 (1992); *Ben-Shalom* v. *Marsh*, 881 F.2d at 458-462; *Rich* v. *Secretary of the Army*, 735 F.2d at 1228-1229. See also *High Tech Gays* v. *Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 578-580 (9th Cir. 1990).

Although the new Act differs from the former policy in other respects, the standards for discharge are substantially similar. See *Able* v. *United States*, 88 F.3d at 1286-1287.